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MANDATORY INFLUENZA VACCINATION POLICIES IN COLORADO: ARE HEALTHCARE EMPLOYEES WITH RELIGIOUS CONFLICTS EXEMPT?

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Colorado is attempting to reduce the spread of influenza in healthcare facilities from healthcare personnel to patients. Colorado's Department of Public Health and Environment ("CDPHE") and the Colorado Hospital Association ("CHA") have each approved initiatives endorsing the need for healthcare organizations in the state to develop influenza vaccination policies to increase vaccination coverage among healthcare personnel. As mandatory influenza vaccinations become more commonplace in healthcare organizations nationwide, concerns have arisen regarding the circumstances in which a healthcare worker may seek an exemption to an employer-mandated immunization. This article discusses mandatory influenza vaccination policies in Colorado and the legal issues healthcare employers should consider when an employee seeks an exemption from an influenza vaccination based on religious beliefs.

I. BACKGROUND

Influenza is a contagious respiratory illness caused by viruses that can cause mild to severe illness and, at times, lead to death.¹ Employees infected with influenza that work in sensitive healthcare environments, like hospitals and nursing care facilities, can transfer the virus to other healthcare personnel and to patients who are more susceptible to risks of severe complications from the illness.² According to data from the Centers for Disease and Control and Prevention, on average, more than 200,000 people in the United States are hospitalized each year for respiratory and heart condition illnesses associated with seasonal influenza

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1. CENTERS FOR DISEASE CONTROL AND PREVENTION, *Seasonal Influenza: Flu Basics*, <http://www.cdc.gov/flu/about/disease/index.htm> (last updated Sep. 28, 2012).

2. CENTERS FOR DISEASE CONTROL AND PREVENTION, *People at High Risk of Developing Flu-Related Complications*, http://www.cdc.gov/flu/about/disease/high_risk.htm (last updated Nov. 1, 2012).

infections.³ In recent years, Colorado has averaged approximately 750 influenza-related hospitalizations, with a high of 2,000 in 2009-10.⁴

To prevent the spread of influenza from healthcare personnel to healthcare patients, the United States Government is promoting awareness among healthcare employers of the need for influenza vaccinations for healthcare personnel.⁵ The Government hopes to increase the percentage of healthcare personnel annually vaccinated against influenza to 90 percent by 2020.⁶ Recent studies reflect, however, that influenza vaccination coverage among healthcare personnel nationwide has remained constant over the past few years, with annual employee vaccination rates averaging around 60 percent.⁷ As a result, states and healthcare employers across the nation are taking action to reduce the spread of influenza in healthcare facilities by requiring the implementation of influenza vaccination policies for healthcare personnel.⁸

In Colorado, the CDPHE and the CHA have each approved initiatives addressing the necessity of mandatory influenza vaccinations for healthcare personnel with the goal of reducing the transmission of influenza to healthcare patients and residents. The State's Board of Health, through the CDPHE, has passed the Healthcare Workers Influenza Rule⁹ ("HCW Influenza Rule" or "Rule"), which mandates that all healthcare entities¹⁰ licensed by the CDPHE implement influenza vaccination policies and requires certain healthcare workers to receive annual influenza vaccinations.¹¹ In addition, the CHA, which supported the passing of the HCW Influenza Rule, passed a similar resolution recommending that its

3. CENTERS FOR DISEASE CONTROL AND PREVENTION, *Seasonal Influenza-Associated Hospitalizations in the United States*, <http://www.cdc.gov/flu/about/qa/hospital.htm> (last updated Jun. 24, 2011).

4. Michael Booth, *Colorado Flu Season Heating Up As Some Run Out of Vaccine, Cases Rise*, THE DENVER POST, Jan. 10, 2013, http://www.denverpost.com/news/ci_22343609/colorado-flu-season-heating-up-some-run-out.

5. HEALTHY PEOPLE 2020, *Immunization and Infectious Diseases*, <http://www.healthypeople.gov/2020/topicsobjectives2020/objectiveslist.aspx?topicId=23> (last updated Oct. 30, 2012).

6. *Id.*

7. J. Zhang, G.L. Euler, S.B. Graitcer, S. Grevy, *Health Care Personnel Flu Vaccination -- Internet Panel Survey, United States, November 2012*, <http://www.cdc.gov/flu/pdf/fluview/hcp-ips-nov2012.pdf> (last updated Dec. 3, 2012).

8. CENTERS FOR DISEASE CONTROL AND PREVENTION, *State Immunization Laws for Healthcare Workers and Patients*, <http://www2a.cdc.gov/nip/StateVaccApp/statevaccsApp/default.asp> (last updated Feb. 28, 2013).

9. CDPHE, PART 10 - INFLUENZA IMMUNIZATION OF HEALTHCARE WORKERS, 46-50, http://www.colorado.gov/cs/Satellite?c=Document_C&childpagename=CDPHE-Main%2FDocument_C%2FCBONAddLinkView&cid=1251599652707&pagename=CBONWrapper (last modified Feb 15, 2012) (setting forth the provisions of the HCW Influenza Rule).

10. The HCW Influenza Rule defines "Healthcare Entity" as a health care facility or agency that is required to obtain a license from the [CDPHE.]" *Id.* at 10.5(D).

11. CDPHE, FEB. 15, 2012 BOARD OF HEALTH RULING REGARDING INFLUENZA VACCINATIONS FOR HEALTH CARE WORKERS, http://www.colorado.gov/cs/Satellite?c=Document_C&childpagename=CDPHE-Main%2FDocument_C%2FCBONAddLinkView&cid=1251627214688&pagename=CBONWrapper (last visited Mar. 5, 2013).

member hospitals and health systems require mandatory influenza vaccinations for their healthcare personnel.¹²

Healthcare workers who do not comply with their employer's influenza vaccination policy by not receiving an influenza immunization may face the possibility of discipline or termination of their employment.¹³ As more states and healthcare employers enact influenza vaccination policies like the HCW Influenza Rule, issues concerning the individual rights of healthcare workers have arisen, including whether healthcare workers can object to the mandatory influenza vaccinations based on their religious beliefs.¹⁴

As a result of these concerns, the Equal Employment Opportunity Commission ("EEOC") has released informal discussion letters addressing the issues arising out of influenza vaccination policies and religious accommodations under Title VII of the Civil Rights Act of 1964 ("Title VII").¹⁵ These informal discussion letters suggest that healthcare employees may be entitled to receive a religious accommodation to a mandatory influenza vaccination under Title VII.¹⁶

Although the HCW Influenza Rule and the CHA resolution do not require healthcare entities to provide for a religious exemption to mandatory influenza vaccinations, healthcare employers in Colorado should understand the legal ramifications when addressing a situation in which a healthcare employee is seeking an accommodation to a mandatory influenza vaccination based on religious grounds.

II. COLORADO APPROVES THE HCW INFLUENZA RULE REQUIRING HEALTHCARE ENTITIES TO IMPLEMENT INFLUENZA VACCINATION POLICIES FOR HEALTHCARE PERSONNEL

On February 15, 2012, the Colorado Board of Health, through the CDPHE, ruled in favor of passing the HCW Influenza Rule requiring all healthcare entities licensed by the CDPHE to implement influenza vaccination policies for their healthcare personnel.¹⁷ The intent of the Rule

12. CHA, *Influenza Vaccination Tool Kit*, http://www.cha.com/CHA/Focus_Areas/Quality_Patient_Safety/Quality_Systems_Improvements/Influenza_Vaccination_Toolkit/CHA/_Focus_Areas/_Quality/Influenza_Vaccination_Tool_Kit.aspx?hkey=a55eb5cd-45d5-40ba-b4b3-9e2e8d75195a (last visited Mar. 4, 2013).

13. *Hospital Employees' Jobs In Jeopardy If They Don't Get Flu Shot*, CBS4 DENVER, Oct. 4, 2012, <http://denver.cbslocal.com/2012/10/04/hospital-employees-threatened-jobs-flu-shot>.

14. See, e.g., Sydney Lupkin, *Nurses Fired for Refusing Flu Shot*, ABC NEWS, Jan. 3, 2013, <http://news.yahoo.com/nurses-fired-refusing-flu-shot-224637902--abc-news-health.html>.

15. EEOC, TITLE VII: VACCINATION POLICIES AND REASONABLE ACCOMMODATION, Dec. 5, 2012, http://www.eeoc.gov/eeoc/foia/letters/2012/tiitle_vii_vaccination_polices_and_reasonable_accommodation.html; EEOC, TITLE VII: RELIGIOUS ACCOMMODATION, Mar. 5, 2012, http://www.eeoc.gov/eeoc/foia/letters/2012/religious_accommodation.html.

16. *Id.*

17. CDPHE, *supra* note 11.

was to promote patient safety by protecting vulnerable patients from influenza.¹⁸ The CDPHE acknowledged that healthcare employers and healthcare personnel have a shared responsibility in preventing the spread of infection and avoid causing harm to their patients or residents by taking reasonable precautions to prevent the transmission of vaccine-preventable diseases.¹⁹ The HCW Influenza Rule requires each healthcare entity to develop an influenza policy that documents the number of its employees that are vaccinated against seasonal influenza, and annually reports that number to the CDPHE at the end of each influenza season.²⁰

The CDPHE modeled the HCW Influenza Rule to: (1) encourage healthcare entities that are already appropriately implementing strategies to prevent influenza to continue to do so, (2) to assist healthcare entities that can improve, and (3) to prompt healthcare entities to adopt more effective policies to prevent influenza.²¹ For healthcare entities that have already implemented their own influenza policy, the HCW Influenza Rule allows these employers to opt-out of the Rule's policy requirements, provided that they are able to demonstrate to the CDPHE that they can annually achieve a minimum threshold of influenza vaccinations among their employees (*i.e.*, 90 percent of employees by 2014 and beyond).²² For healthcare entities needing to develop or implement more effective influenza vaccination policies, the HCW Influenza Rule presents different policy requirements for healthcare employers depending on the type of healthcare service provided.²³ The policy requirements differentiate between general hospitals, hospital units, ambulatory surgical centers, and long-term nursing care facilities ("higher-risk entities") and all other licensed healthcare entities ("lower-risk entities").²⁴ Among other requirements, healthcare workers at higher-risk facilities are required to receive annual influenza vaccinations under the Rule, while healthcare workers at lower-risk entities are not.²⁵

However, the HCW Influenza Rule provides no exemption to healthcare workers with religious objections to an influenza vaccination,

18. *Id.*

19. *Id.*

20. *Id.*

21. CDPHE, *Influenza Immunization for Healthcare Workers: Ready to Report Toolkit*, 3, <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadname1=Content-Disposition&blobheadname2=Content-Type&blobheadvalue1=inline%3B+filename%3D%22Influenza+Immunization+Healthcare+Worker+Toolkit+2012-12-18.pdf%22&blobheadvalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251843386367&ssbinary=true> (last modified Dec. 18, 2012).

22. CDPHE, *supra* note 9, at §§ 10.7–10.9.

23. Compare HCW Influenza Rule 10.7–10.9 with HCW Influenza Rule 10.10–10.12.

24. See, e.g., *id.*

25. See *id.*

regardless of whether the healthcare entity falls under the higher or lower-risk designation.

1. Exemption for Healthcare Entities Meeting Employee Vaccination Targets

Each healthcare entity that has already taken measures to ensure patient safety by promoting or mandating influenza vaccinations has the option to be exempted from the more stringent policy implications of the HCW Influenza Rule, provided they can meet certain annual vaccination targets of their employees.²⁶ Currently, the minimum targets healthcare entities must achieve in order to remain exempt from the Rule's policy requirements are as follows:

- 75 percent of all employees from Oct. 1, 2013, to Dec. 31, 2013;
- 90 percent of all employees from Oct. 1, 2014, to Dec. 31, 2014, and every year thereafter.²⁷

When the HCW Influenza Rule came into effect in 2012, exempt healthcare entities were required to achieve a vaccination rate of 60 percent of their employees.²⁸

If a healthcare entity meets or exceeds these target vaccination percentages for each given year, the entity is exempt from making policy changes set by the HCW Influenza Rule for the following year, as long as it continues to use the same or more stringent methods of promoting or mandating influenza vaccinations for its employees.²⁹ If, however, a healthcare entity fails to achieve a vaccination rate at or above the rate set forth under the Rule, that entity will be required to adopt the vaccination policies created by the CDPHE for the following influenza season.³⁰

While healthcare entities that choose to opt-out of the HCW Influenza Rule's policy requirements are allowed to develop an influenza vaccination policy using their own methodology, exempt employers must vaccinate a wider range of healthcare personnel than healthcare entities that are not exempt from the Rule.³¹ This difference arises because the HCW Influenza Rule requires exempt healthcare entities to vaccinate a certain target of their employees,³² while non-exempt healthcare entities

26. *Id.* at § 10.6.

27. *Id.*

28. *Id.*

29. *Id.*

30. See CDPHE, *supra* note 21, at 3–4.

31. CDPHE, *supra* note 9.

32. The HCW Influenza Rule defines "employee" as "[A]ny person who performs a service for wages or other remuneration for a licensed healthcare entity. [T]he definition of employee includes students, trainees, persons who have individual contracts with the healthcare entity, physicians with staff privileges and allied health professionals with privileges. The definition of employee

must implement vaccination policies pertaining to their healthcare workers.³³ Accordingly, any person who performs a service for wages or other remuneration for an exempt healthcare facility falls within the minimum target vaccination threshold required by the HCW Influenza Rule and may therefore require an influenza vaccination to remain employed.

The exemption to the HCW Influenza Rule allows healthcare entities that have already implemented their own influenza vaccination policy to avoid adopting the policy requirements required by the Rule.³⁴ Under the Rule, healthcare entities are ultimately free to refrain from providing employees an exemption to a vaccination requirement for religious reasons as long as they meet the Rule's target vaccination percentages each influenza season.³⁵

2. Policy Implementation Requirements for Higher-Risk Healthcare Entities

Higher-risk entities (general hospitals, hospital units, ambulatory surgical centers, and long-term nursing care facilities) that do not meet the criteria to qualify for the exemption under the HCW Influenza Rule are instructed to implement influenza vaccination policies requiring their healthcare workers to receive mandatory influenza vaccinations.³⁶ The HCW Influenza Rule mandates these higher-risk employers to provide the influenza immunization to each healthcare worker when the vaccine becomes readily available at the start of each influenza season.³⁷

The HCW Influenza Rule requires higher-risk entities to maintain an influenza policy regarding the annual influenza immunization of its healthcare workers that, at a minimum, addresses and ensures that each of its healthcare workers has either: (1) proof of immunization, or (2) a medical exemption.³⁸ Healthcare workers requesting a medical exemption must obtain authorization signed by a physician, physician's assis-

does not include volunteers or persons who provide services through a contractual arrangement between the licensee and a separate organization, association or other healthcare entity." *Id.* at 10(c).

33. The HCW Influenza Rule defines "healthcare worker" as "[A]ny person, working in a healthcare entity who has the potential for exposure to patients, residents, or consumers of the healthcare entity and/or to infectious materials, including body substances, contaminated medical supplies and equipment, contaminated environmental surfaces, or contaminated air. Healthcare worker includes, but is not limited to, physicians, nurses, nursing assistants, therapists, technicians, emergency medical service personnel, dental personnel, pharmacists, laboratory personnel, autopsy personnel, students and trainees, contractual personnel, home care personnel, and persons not directly involved in patient care (e.g., clerical, dietary, house-keeping, laundry, security, maintenance, billing and chaplains) but potentially exposed to infectious agents that can be transmitted to and from the healthcare worker and patients, residents or consumers of the healthcare entity. The definition of healthcare worker does not include volunteers." *Id.* at 10(E).

34. CDPHE, *supra* note 21, at 4.

35. *Id.*

36. CDPHE, *supra* note 9, at 10.8.

37. *Id.* at 10.7.

38. *Id.* at 10.8.

tant, advanced practice nurse, or nurse midwife licensed in the State of Colorado stating that the influenza vaccination is medically contraindicated as described in the product labeling approved by the United States Food and Drug Administration.³⁹ Accordingly, unless a healthcare worker employed at a higher-risk healthcare entity suffers from physical health ailments directly-related to the influenza vaccine itself, that individual is otherwise required to provide proof of influenza immunization or potentially face termination from their employment.

For healthcare workers that receive a medical exemption, healthcare entities are required to make surgical or procedure masks available for those workers.⁴⁰ These healthcare workers must wear their protective masks during the entirety of the influenza season whenever in direct contact with patients and in common areas specifically designated by the healthcare entity.⁴¹ While higher-risk entities are required to exempt these healthcare workers based on medical exemptions, higher-risk entities are not required to provide healthcare workers an exemption to the required proof of immunization based on religious belief.

3. Policy Implementation Requirements for Lower-Risk Healthcare Entities

Unlike higher-risk entities, lower-risk entities are not mandated by the HCW Influenza Rule to require mandatory influenza vaccinations for their healthcare workers. Lower-risk entities consist of all other licensed healthcare entities not included in the higher-risk policy requirements, such as: assisted living residences, community clinics, community mental health centers, facilities for persons with developmental disabilities, hospices, dialysis treatment clinics, home care agencies, psychiatric hospitals, rehabilitation hospitals, convalescent centers, acute treatment units, and birth centers.⁴²

Instead of requiring mandatory influenza vaccinations for healthcare workers, lower-risk entities must each perform an assessment of their facility to develop a policy regarding influenza transmission from their healthcare workers to their patients, and create an influenza policy based on that assessment.⁴³ Factors lower-risk entities must consider when performing this assessment include:

- The number of healthcare workers at the healthcare entity;
- The number of patients, residents, or consumers served by the healthcare entity;

39. *Id.*

40. *Id.*

41. *Id.*

42. *Supra* Part II.2.

43. CDPHE, *supra* note 9, at 10.10.

- Whether the healthcare entity has an ongoing employee wellness program that offers annual influenza vaccinations;
- Whether influenza transmission from healthcare workers is addressed in the healthcare entity's infection control policy;
- What precautions are taken to prevent the transmission of influenza from unvaccinated healthcare workers; and
- What type of educational material is utilized by the healthcare entity to promote influenza immunization for its healthcare workers.⁴⁴

Based on the assessment that is performed from these criteria, lower-risk entities are required to then implement an influenza policy regarding the annual influenza immunization of their healthcare workers that addresses and ensures: (1) that each healthcare worker is offered the opportunity to receive an annual influenza immunization; (2) the healthcare entities document each employee's annual immunization, declination, or exemption from immunization; and (3) that healthcare workers are provided information regarding the benefits and risks of influenza immunization, the availability of influenza immunization, and the importance of adhering to standard precautions.⁴⁵

III. THE COLORADO HOSPITAL ASSOCIATION APPROVES A RESOLUTION RECOMMENDING MANDATORY INFLUENZA VACCINATIONS FOR MEMBER HOSPITALS AND HEALTH SYSTEMS

The HCW Influenza Rule was passed with support from the CHA, which had previously passed a resolution recommending mandatory influenza vaccinations for all healthcare personnel. The CHA represents Colorado's hospital community, including 95 hospitals and health systems ("members") across the state.⁴⁶ CHA's members include private and government-operated, metropolitan and rural, investor-owned and not-for-profit facilities.⁴⁷ In 2011, the CHA's Board of Trustees approved a resolution, similar to the HCW Influenza Rule, recommending CHA members to require annual influenza vaccinations for all healthcare personnel. Specifically, the CHA approved resolution recommends that:

All CHA member hospitals and health systems should adopt a mandatory influenza policy and provide influenza vaccination to all

44. *Id.*

45. *Id.* at 10.11.

46. CHA, *About CHA*,

http://www.cha.com/CHA/About/Overview_AboutCha/CHA/About.aspx?hkey=eba17963-cb6b-49b0-a9bb-893ce8a347cd (last visited Mar. 4, 2013).

47. CHA, *Member Hospitals & Health Systems*, http://www.cha.com/CHA/About/Members/CHA/_About_CHA/Members_Hospitals.aspx?hkey=6bf1eff3-fd7b-4759-a7d0-4e71ebe93be7 (last visited Mar. 4, 2013).

healthcare personnel such that all healthcare personal are required to provide: (1) annual documentation of influenza immunization; OR (2) documentation from a licensed physician indicating evidence-based medical contraindication against influenza vaccination AND be required to wear a surgical mask at all times while on the health care premises.⁴⁸

Unlike the HCW Influenza Rule, the CHA-approved resolution deliberately excluded the recommendation of religious exemptions for mandatory vaccination policies.⁴⁹ According to the CHA, “[r]esearch by CHA as well as member infection control physicians and nurses has not produced any valid and documented religious exemptions from specific religious faiths. However, anecdotal reports have indicated that some religious faiths such as Christian Scientists or Native Americans that have specific ties to certain tribes and their shaman may be religiously opposed to vaccines.”⁵⁰

Instead, the CHA recommends that its members create a policy that is clear on the documentation that needs to be provided as well as the specific steps that should be taken by employees to discuss the religious declination if they decide to allow religious exemptions.⁵¹ The CHA additionally recommends that healthcare entities require valid documentation from an individual outlining the specific faith-based concerns against an influenza vaccination and to provide counsel between the individual and the healthcare entity’s chaplain or other faith-based support services to discuss the individual’s religious concerns.⁵²

Because the CHA resolution purposefully excluded the recommendation of a religious exemption to influenza policies, CHA members are likely less inclined to include a religious exemption in their influenza vaccination policies. Although the CHA recommends that their members evaluate the needs of its organization when determining whether to allow a religious exemption, healthcare entities that maintain policies prohibiting religious exemptions to mandatory influenza immunizations should be aware of the potential legal ramifications under Title VII for failing to make a religious accommodation to one of their employees.

IV. RELIGIOUS ACCOMMODATIONS TO MANDATORY INFLUENZA VACCINATIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Based on EEOC informal discussion letters addressing vaccination policies and religious accommodations, healthcare personnel may have a

48. CHA, *Guidance for Developing a Mandatory Influenza Vaccination Program*, 4, <http://www.cha.com/pdfs/Quality/Influenza/Tool%20Kit.pdf> (last visited Mar. 4, 2013) (emphasis in original).

49. *Id.* at 17.

50. *Id.*

51. *Id.*

52. *Id.*

claim under Title VII if their employer fails to provide them with religious accommodation from a mandatory influenza vaccination based on their religious belief.⁵³ Although there is currently no official EEOC opinion addressing whether a healthcare employer may compel its employees to receive an influenza vaccination despite their religious objections, as healthcare entities in Colorado develop and maintain their influenza vaccination policies in accordance with the requirements of the HCW Influenza Rule, healthcare employers should understand the legal ramifications under Title VII when considering an employee's request for an accommodation based on religious belief.

1. Title VII Permits Religious Accommodations to Employees Absent Undue Hardship to the Employer

Title VII protects persons against discrimination in their employment because of sex, race, color, religion, or national origin.⁵⁴ Title VII provides that "the term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."⁵⁵ Therefore, "it is an unlawful employment practice . . . for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees."⁵⁶ Based on the EEOC informal discussion letters, it may be an unlawful employment practice for a healthcare employer to deny a request for religious accommodation to a mandatory influenza vaccination if a healthcare employee sincerely holds his or her religious beliefs and if the accommodation would not pose an undue hardship on the employer.⁵⁷

2. Request for Accommodation Must Pertain to Religion

A request for religious accommodation by a healthcare worker from a mandatory influenza vaccination must be based on religious belief and not social, political, or economic belief. Title VII defines "religion" to include "all aspects of religious observance and practice as well as belief."⁵⁸ Under this broad definition, "religion" includes not only traditional, organized religions such as Christianity, Islam, Judaism, Hinduism, and Buddhism, but the definition also includes religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical, unorthodox or

53. EEOC, *supra* note 15.

54. 42 U.S.C. §§ 2000e-2000e-17 (2012).

55. *Id.* at § 2000e(j).

56. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).

57. EEOC, *supra* note 15.

58. 42 U.S.C. § 2000e(j) (2012).

unreasonable to others.⁵⁹ Moreover, an individual's religious beliefs must not be evaluated against only traditional or parochial concepts of religion.⁶⁰ Rather, a belief can be considered "religious" under Title VII so long as the belief is "'religious' in [the individual's] own scheme of things."⁶¹ That is, the individual's belief is "a sincere and meaningful belief that occupies in the life of its possessor a place parallel to that filled by . . . God."⁶² An employee's belief or practice can be "religious" under Title VII even if the employee is affiliated with a religious group that does not advocate or recognize that individual's belief or practice, or if few—or no—other people adhere to it.⁶³

Religious beliefs under Title VII include traditional theistic terms of belief, but the definition has also broadened over the years to include non-theistic beliefs.⁶⁴ Whereas theistic beliefs acknowledge the existence of at least one god, non-theistic beliefs are "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."⁶⁵ Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are strongly held.⁶⁶ Religion, rather, typically concerns "ultimate ideas" about "life, purpose, and death."⁶⁷ Social, political, or economic philosophies, as well as personal preferences, are not "religious" beliefs protected under Title VII.⁶⁸ Accordingly, healthcare employers are entitled to deny a request for reli-

59. See EEOC, QUESTIONS AND ANSWERS: RELIGIOUS DISCRIMINATION IN THE WORKPLACE, http://www.eeoc.gov/policy/docs/qanda_religion.html, (last modified Jan. 31, 2011); see also *Thomas v. Review Bd. of the Indiana Emp't Sec. Div.*, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

60. *Thomas*, 450 U.S. at 716 ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or [another practitioner] . . . more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.")

61. *United States v. Seeger*, 380 U.S. 163 (1969).

62. *Id.* at 176.

63. See 29 C.F.R. § 1605.1 ("The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.")

64. *Carpenter v. Wilkinson*, 946 F. Supp. 522, 525 (N.D. Ohio 1996) ("Early Supreme Court precedent defined religion in traditional theistic terms . . . [o]ver the years, case law broadened to protect unorthodox and non-theistic beliefs.").

65. 29 C.F.R. § 1605.1; compare *Malnak v. Yogi*, 592 F.2d 197, 205 (3d Cir. 1979) with *E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 56 (1st Cir. 2002).

66. *U.S. v. Meyers*, 906 F. Supp. 1494, 1499 (D. Wyo. 1995). ("[I]f there is any doubt about whether a particular set of beliefs constitutes a religion, the Court will err on the side of freedom and find that the beliefs are a religion . . . [because the country's] founders were animated in large part by a desire for religious liberty"), *aff'd*, 95 F.3d 1475, 1482–83 (10th Cir. 1996).

67. See EEOC, *supra* note 59; see also *Brown v. Pena*, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977) ("religious" belief under Title VII "is based on a theory of 'man's nature or his place in the Universe,' [and is] not merely a personal preference"), *aff'd*, 589 F.2d 1113 (5th Cir. 1979).

68. *Slater v. King Soopers*, 809 F. Supp. 809, 810 (D. Colo. 1992) (dismissing religious discrimination claim by a member of the Ku Klux Klan who allegedly was fired for participating in a Hitler rally because the Ku Klux Klan is "political and social in nature" and is not a religion for Title VII purposes).

religious accommodation to a healthcare worker if the request is based on social, political, or economic values.

Determining whether a practice is religious turns not on the nature of the activity, but on the employee's motivation. The same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons. Healthcare employers must therefore assess whether or not an employee's practice is "religious" on a situational, case-by-case basis.⁶⁹

3. *Religious Beliefs Must Be Sincerely Held*

Under Title VII, employers are required to accommodate only those religious beliefs that are "sincerely held."⁷⁰ The EEOC states that "[b]ecause the definition of religion is broad and protects beliefs and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely-held religious belief."⁷¹

The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.⁷² Factors that – either alone or in combination – might undermine a healthcare employee's assertion that the individual sincerely holds the religious belief at issue include:

- Whether the employee has behaved in a manner markedly inconsistent with the professed belief;
- Whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons;
- Whether the timing of the request renders it suspect (*e.g.*, it follows an earlier request by the employee for the same benefit for secular reasons); and
- Whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.⁷³

None of these factors, however, are dispositive.⁷⁴ Accordingly, healthcare employers should proceed with caution in challenging a

69. *Spencer v. World Vision, Inc.*, 633 F.3d 723, 729 (9th Cir. 2011).

70. 29 C.F.R. § 1605.1; *see also Seeger*, 380 U.S. at 163, and *Welsh v. United States*, 398 U.S. 333 (1970).

71. EEOC, TITLE VII: RELIGIOUS ACCOMMODATION, Mar. 5, 2012, http://www.eeoc.gov/eeoc/foia/letters/2012/religious_accommodation.html.

72. 29 C.F.R. § 1605.1.

73. EEOC, *supra* note 71.

worker's religious beliefs. However, if an employer has an objective basis for questioning the sincerity of an employee's religious beliefs, the employer may perform additional inquiry to obtain supporting information to address any reasonable doubt of the sincerity of the belief.

4. Employer Inquiries Are Permitted to Address Concerns Regarding the Sincerity of the Religious Beliefs

If a healthcare worker requests a religious accommodation to an influenza vaccination, and the employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief or practice, the EEOC permits the employer to seek additional supporting information from the worker.⁷⁵ If the healthcare worker fails to cooperate with an employer's request for supporting information, the worker may not be entitled to the accommodation.⁷⁶

Upon receiving a request for additional information from an employer, an employee should provide information that addresses the employer's reasonable doubts. However, the supporting information need not take any specific form.⁷⁷ The EEOC states that written materials or the employee's own first-hand explanation may be sufficient to alleviate the employer's doubts about the sincerity or religious nature of the employee's professed belief such that third-party verification is unnecessary.⁷⁸ Even when third-party verification is needed, however, since an employee's idiosyncratic beliefs can be sincerely held and religious, the verification does not have to come from a church official or member, but instead could be provided by others who are aware of the employee's religious practice or belief.⁷⁹

Accordingly, healthcare employers that fail to address religious exemptions in their influenza policies, or do not include provisions describing the type of documentation required to support a request for accommodation, may end up liable under Title VII if they deny a religious accommodation to healthcare workers who provide their employers with first-hand explanations of their religious conflicts to the administration of an influenza vaccine in response to their employer's inquiry for additional support.

74. *Id.*

75. EEOC, TITLE VII: VACCINATION POLICIES AND REASONABLE ACCOMMODATION, Dec. 5, 2012, http://www.eeoc.gov/eeoc/foia/letters/2012/title_vii_vaccination_policies_and_reasonable_accommodation.html (citing *Bushouse v. Local Union 2209, United Auto., Aerospace & Agric. Implement Workers of Am.*, 164 F. Sup. 2d 1066, 1076–78 (N.D. Ind. 2001)).

76. *Id.*

77. EEOC, *supra* note 71.

78. *Id.*

79. *Id.*

5. *Reasonable Accommodation Can Consist of Measures in Lieu of Vaccination*

According to the EEOC, healthcare employers can take measures in lieu of vaccinating healthcare workers seeking religious accommodations from influenza immunizations.⁸⁰ An accommodation is not “reasonable,” however, if it merely lessens rather than eliminates the conflict between religion and work.⁸¹ Accordingly, like healthcare workers who receive a medical exemption under the HCW Influenza Rule and CHA resolution, the EEOC provides that healthcare entities could accommodate healthcare workers with religious conflicts to influenza vaccinations by requiring the workers to wear surgical or protective masks while working with, or around, patients during the influenza season.⁸²

6. *Religious Accommodation May Be Denied to Undue Hardship to the Employer*

Healthcare entities may ultimately deny a healthcare workers request for a religious accommodation to a mandatory influenza vaccination if the accommodation requested would pose an undue hardship to the employer. Under Title VII, undue hardship may be shown if the accommodation would impose “more than *de minimis* cost” on the operation of the employer’s business.⁸³ The healthcare employer will need to demonstrate how much cost or disruption the employee’s proposed accommodation would involve.⁸⁴ To establish undue hardship in the context of mandatory influenza vaccinations, the EEOC has provided a list of non-exhaustive factors that healthcare entities may consider when addressing whether an exemption to an influenza vaccine would cause an undue hardship. These factors include:

- Whether the employee behaved in a manner markedly inconsistent with the professed belief;
- Whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons;
- Whether the timing of the request is suspect; or
- Whether the employer had reason to believe that the accommodation is not sought for religious reasons.⁸⁵

When denying a request for religious accommodation to a mandatory influenza vaccination, the burden is on the healthcare employer to

80. *Supra* note 71.

81. *See* EEOC v. Ilona of Hungary, Inc., 108 F.3d 1569 (7th Cir. 1997) (failing to satisfy reasonable accommodation requirement by offering to let Jewish employees take off a day other than Yom Kippur).

82. *Id.*

83. 29 C.F.R. § 1605.2(e); *Hardison*, 432 U.S. at 84.

84. *Id.*

85. *Supra* note 71.

prove undue hardship.⁸⁶ The determination of whether a proposed accommodation would pose an undue hardship is based on concrete, fact-specific considerations.⁸⁷ A healthcare employer cannot rely merely on a potential or hypothetical hardship when faced with a religious objection that conflicts with a vaccination; rather, it must rely on objective information.⁸⁸ Accordingly, healthcare employers may not rely on the possibility that, if one individual seeks an accommodation based on religious belief, more employees with the same religious practices might also seek an exemption to an influenza vaccination as evidence of undue hardship.

V. CONCLUSION

Healthcare entities in Colorado and across the nation are implementing mandatory influenza vaccination policies in an effort to reduce the risk of healthcare personnel infected with influenza from transmitting the virus to high risk individuals. Although the CDPHE and the CHA have approved initiatives requiring mandatory influenza vaccinations for certain healthcare personnel, these initiatives generally fail to address the concerns of healthcare workers with religious objections to influenza vaccines.

Based on informal letters by the EEOC, healthcare employers should consider including a provision addressing religious exemptions to their mandatory vaccination policies, if they have not already done so. As Colorado presses forward in its effort to prevent the spread of influenza to healthcare patients, healthcare employers in compliance with Colorado's mandatory vaccination rule could nonetheless face potential legal ramifications for denying an employee's request for a religious accommodation to vaccination.

86. 29 C.F.R. § 1605.2(e) (requiring employer to demonstrate "more than a *de minimis* cost.").

87. *Tooley v. Martin Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981).

88. *See Brown v. Gen. Motors Corp.*, 601 F.2d 956, 960 (8th Cir. 1979) ("projected 'theoretical' future effects cannot outweigh the undisputed fact that no monetary costs and *de minimis* efficiency problems were actually incurred during the three month period in which [employee] was accommodated").